

FILED
Court of Appeals
Division II
State of Washington
5/22/2020 3:33 PM

NO. 54288-9-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL EARL MILLER,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Jerry T. Costello

No. 18-1-03704-4

BRIEF OF RESPONDENT

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I. INTRODUCTION

Defendant Michael Miller testified that the president and vice-president of his homeowner's association came to his home. After an altercation and tussle with Mr. Aitchison, the Defendant told the men to leave, and they did. They stood for a few minutes at their truck which was parked on a public road. The Defendant testified that he returned to his house and retrieved a large-caliber, long-barreled revolver purchased for protection against Alaskan bears. From the front stoop or entry of his mobile home, the Defendant shot at the men several times. The first bullet passed between Mr. Aitchison's legs and tore into the driver's door of the truck.

The court properly instructed the jury that deadly force may be used to prevent imminent, great personal injury. The Defendant argues that the law permits the disproportionate use of deadly force to prevent minor injury. Not only is this neither the law nor the public policy, but the Defendant had no right to instruct the jury on self-defense in the first place. His actions were unjustifiable as a matter of law.

The Defendant complains that the lower court should have instructed the jury on Unlawful Display of a Firearm. The offense is not a lesser included under the *Workman* test, where the menacing misdemeanor

is not a necessary element of the assault offense and where there is no inference that only an unlawful display occurred to the exclusion of the assaults which he admitted in testimony. Nor could the court instruct the jury on an offense which, as a matter of law, cannot be committed from one's own abode. The convictions should be affirmed.

II. RESPONDENT'S ASSIGNMENT OF ERROR

The State respectfully asks the court to consider the following error pursuant to RAP 2.4(a): that, as a matter of law, the Defendant was not entitled to any self defense instruction.

III. RESTATEMENT OF THE ISSUES

- A. Where the Defendant's shooting at departing neighbors on the public road was unjustifiable as a matter of law, is there a right to instruct the jury on self defense?
- B. Where the Defendant used deadly force by shooting a large caliber weapon at victims, does the court err in applying the pertinent instruction?
- C. Is Unlawful Display of a Firearm a lesser included offense of First Degree Assault under the facts of this case?
- D. Is the small porch entry to the Defendant's mobile home part of the "abode" within the meaning of RCW 9.41.270(3)(a)?
- E. Did the trial court abuse its discretion in denying the request for a change of counsel where a thorough inquiry of client and counsel over two hearings established that there was neither before conflict of interest nor a breakdown in communication?

IV. STATEMENT OF THE CASE

The Defendant Michael Miller has been convicted by a jury of two counts of assault in the second degree with firearm enhancements. CP 68-69, 71-72, 78.

The Defendant lived in a resident-owned, cooperative mobile home park. 2RP¹ 380. He was frequently drunk, unfriendly, and unneighborly. 2RP 222-24. He disparaged neighbors for their sexual orientation or gender identity; frequently filed complaints about his neighbors' music, dogs, and vehicles; and even tried to stab the next door neighbor's dog. 2RP 222-23, 418-19, 698-701.

On September 14, 2018, Jessica McIntyre-Aitchison was tidying up a vacant trailer whose previous owner had passed away. 2RP 321-22. The Defendant confronted her, challenging her authority to enter. 2RP 324-27. He was rude and abrasive, and could not be bothered to read the posted legal notice. 2RP 324, 708. Ms. McIntyre-Aitchison felt uncomfortable and caught off guard. 2RP 324. She asked him to take his concern to her father Steve Aitchison, who the Defendant knew to be the president of the mobile

¹ "1RP" refers to the consecutively numbered Verbatim Report of Proceedings of pretrial hearings as transcribed by Official Court Reporter Susan A. Zielie. "2RP" refers to the consecutively numbered Verbatim Report of Proceedings of the trial and sentencing as transcribed by Official Court Reporter Karla A. Thomas.

park homeowners' association board. 2RP 265, 382, 695-96. The Defendant left, saying he would call the police. 2RP 265, 324.

Later that evening, Mr. Aitchison and the board vice president Vernon Frye went to the Defendant's home to reassure him that the young lady's entry had been authorized. 2RP 267, 284, 328-29, 383, 387. As Mr. Aitchison knocked on the door, the Defendant burst through, grabbing Mr. Aitchison by the throat and yelling, "Get the F off my property." 2RP 268-69, 390-92, 422-23. The Defendant threw a punch, Mr. Aitchison's foot slipped through the plywood porch, and they ended up on the ground with the Defendant still yelling profanities and swinging as Mr. Aitchison lay on top of the Defendant's back. 2RP 203-04, 225, 255-56, 270-71, 391-92, 424-25. Mr. Aitchison told the Defendant to knock it off and calm down or he would call the police. 2RP 204, 218-21, 225, 255-56, 271, 392.

Ms. McIntyre-Aitchison was delivering mail to the park's treasurer Kelly Wernex a couple trailers away and turned to observe the skirmish. 2RP 284, 328-29. Jourdan Brown² was playing with his fiancé's three year old niece in the puddles just outside his own mobile home right next door. 2RP 101-02, 105, 193, 284, 328-29. Mr. Brown came over to tell Mr. Aitchison to get off the Defendant and just call the police. 2RP 204, 226,

² Although the Defendant referred to his neighbor with feminine pronouns in his testimony and closing argument (*see e.g.* 2RP 754, 811), Mr. Brown identifies as male. 2RP 815.

338, 394-95. But Mr. Brown left when the Defendant yelled at him “to get [his] homo ass off his property.” 2RP 216, 231-32, 395. Mr. Aitchison also left and rejoined Mr. Frye at his truck. 2RP 271-73. There he picked up his phone and asked, “Do I need to call the cops?” 2RP 204, 272.

Before going back inside his house, the Defendant shouted a few more expletives complaining about people being on his porch and knocking on his door. 2RP 204-05, 271. Less than five minutes later, he emerged with a long-barreled revolver. 2RP 204-06, 331-32, 395. Mr. Aitchison was standing at the open door of his truck dialing 911. 2RP 273, 393-945. The Defendant pointed his gun directly at Mr. Aitchison and fired. 2RP 206, 395. He turned and shot at Mr. Frye. 2RP 206, 211-12, 252, 273-77. Then he shot at Ms. Brown and the little girl in the field on the other side of their mobile home. *Id.*

The first bullet passed between Mr. Aitchison’s leg and hit the driver’s door of the truck. 2RP 140-41, 206-07, 339, 398, 435, 488. Mr. Aitchison broke through a gate as he ran for his life. 2RP 395-99. Mr. Frye broke through a fence, taking cover behind the conference room building. 2RP 213-14, 273-75 (“trying not to have holes blown through me”). The child asked Mr. Brown if he had been shot. 2RP 208-09. They knelt behind a three-foot fence until it was clear, and then with Ms. McIntyre-Aitchison’s help, they ran to Mr. Wernex’s home. 2RP 207-08, 212-13, 242, 332, 338.

Various people called the police including the Defendant himself. 2RP 107, 217, 278, 338-39, 399. In his call, the Defendant advised that he had fired four shots over his manager's head and that he would not tell police where the gun was. 2RP 107. Using the public address system, police asked the Defendant to exit his house. 2RP 108. The Defendant exited briefly to make a rude gesture. 2RP 108, 138. After a few more minutes, he exited again and permitted the police to arrest him. 2RP 108-09. There were two handguns on the kitchen counter: a black, long-barreled revolver and a silver, semi-automatic pistol. 2RP 110-11.

After his arrest, the Defendant made a statement to police. He said that he had lunged at Mr. Aitchison when he refused to get off the porch. 2RP 515. They fought and fell to the ground. 2RP 515-16. Mr. Aitchison let the Defendant up. 2RP 516. The Defendant returned to his house, picked up a revolver, went back outside and began shooting in Mr. Aitchison's direction. 2RP 516-17. Although the bullet went between Mr. Aitchison's legs and struck his truck, the Defendant claimed he had shot five feet above the truck. 2RP 532. The Defendant noticed Mr. Frye, whom he described as "that gay fuck wearing black leather or something near Steven," standing next to the truck. 2RP 517. He pointed toward the area where Mr. Frye was standing beside Mr. Aitchison and fired a second shot. 2RP 517-18. Then he said he fired one or two more times at the ground. 2RP 518.

The Defendant was charged with three counts of first degree assault for victims Steven Aitchison, Vernon Frye, and Jourdan Brown. CP 1-2.

Defendant's request for different counsel:

The Defendant was appointed two attorneys Quigley and Talney. 1RP 12; 2RP 2. The trial date was continued several times at the attorneys' request in order to obtain witness interviews, to accommodate counsels' pre-planned vacations and obligations in other cases, due to an attorney injury, and when a settlement fell through. CP 3, 20-22; 1RP 3-5, 10-13, 21-24, 29-30, 51.

On May 3, 2019, the Defendant requested different attorneys. CP 20-21; 1RP 10-14, 31. He explained that he had asked the director of assigned counsel for different attorneys on three different occasions in this case without success. 1RP 14-15. He complained that he did not "get along" with his attorneys and felt that his case was just one of many to them. 1RP 14-15. The Defendant claimed that they were forcing him to take a plea deal. 1RP 12. In fact, the attorneys were expecting to go to trial. 1RP 14. The Honorable Judge Stephanie Arend advised the Defendant that a change of counsel would only further push back the trial date. 1RP 14. The judge explained that, in her experience with the director Kawamura, the department would have thoroughly vetted any client allegation of conflict as well as considered whether there was any other appropriate basis for

reassignment. 1RP 15. Ultimately the court did not find that the Defendant's complaints rose to the level of an actual conflict. 1RP 16.

On September 20, 2019, the Defendant again asked for different attorneys. 1RP 42. He alleged that his attorneys Quigley and Talney had not obtained discovery from the State. *Id.* In fact, the Defendant had viewed all discovery in numerous, documented meetings with his two attorneys and their investigator. 1RP 43.

He complained that he felt that the attorneys challenged his explanation of events. 1RP 42. Counselor Quigley advised the court that:

Mr. Miller and I have had some difficult conversations. This is a difficult case. If he's convicted, he's going to spend the rest of his life in prison. That's a fact, and that's what I told him. And he doesn't want to hear it.

He's also been made an offer, which, in my opinion, he should take. He doesn't have to. He doesn't like my advice. That's fine.

This is set for trial in 10 days. I'll be ready.

1RP 44.

Judge Arend explained to the Defendant that "conflict" was a term of art, which did not mean the relationship was free of all disagreement. 1RP 45. The attorneys had a duty to advise the client of risks. 1RP 45-46. "They wouldn't be doing their job if they didn't tell you that, as much as you may not like to hear whatever it is they have to say." 1RP 46. The court denied the Defendant's motion for new counsel. 1RP 46.

Self defense claim:

The omnibus order was filed 11 months before the trial date. CP *99-101. At that time, the Defendant advised the theory of defense would be general denial or possible voluntary intoxication. CP 100. However, on the first day of trial, defense counsel advised the State for the first time of an intent to allege self-defense. 2RP 8-10. The prosecutor objected, explaining that there was no suggestion in any of the witness interviews that the Defendant may have acted in self-defense. 2RP 11.

I can't say specifically without knowing the basis for their self-defense. I know Mr. Quigley said he doesn't know if he has it or not.

2RP 12. However, the prosecutor did not propose to delay trial any further.

2RP 11.

At trial, the Defendant acknowledged that he had never had any problems with either man. 2RP 417, 746. However, he claimed that he felt surrounded by them simply because Mr. Aitchison knocked on his door, while Mr. Frye remained by the truck. 2RP 290, 425-26, 716-17. He suggested the only non-threatening way for them to have approached the door would have been if both stood on his porch together. Exh. 17; 2RP 717. But the two men together were too large for the small, rotting porch. 2RP 227, 275, 293, 299, 413, 422-23, 716, 747.

He claimed it was common knowledge that Mr. Aitchison carried a gun. 2RP 701, 722. But Mr. Aitchison was not in possession of a weapon. 2RP 233, 416. It was the Defendant who had two fully loaded guns at hand. 2RP 723-24, 742, 744. The long-barreled revolver was a large caliber weapon purchased for protection against Alaskan bears. 2RP 740-41.

The Defendant claimed that he told the men they could reach him during the daylight. 2RP 718. No other witness corroborated this. In fact, Mr. Aitchison and Mr. Brown both testified it was light out at 7 p.m. in September, and they had no trouble seeing. 2RP 193, 429.

For the first time, at trial, the Defendant claimed Mr. Aitchison initially refused to leave and screamed, “Don’t you ever fuck with my daughter; don’t ever talk to her.” 2RP 718, 721. No other witness corroborated this. The Defendant said Mr. Brown had run over during the skirmish to volunteer to testify that the Defendant had jumped Mr. Aitchison. 2RP 754. In fact, Mr. Brown testified that he did not see how the skirmish began and was concerned for the Defendant who is kind of frail and was underneath the much larger Mr. Aitchison. 2RP 203, 226

The Defendant said he became “concerned,” because although the men left, they did not immediately drive away from their spot on a public road. 2RP 722, 753-54. Mr. Aitchison had twice mentioned calling the police and Mr. Brown had asked him to do so. 2RP 204, 220, 272, 392-93.

The Defendant denied hearing this. 2RP 748-49. He himself was no stranger to making police reports. 2RP 699, 701, 709, 711. And he testified he “probably” could have called police at that point, but he was angry and acted too fast. 2RP 749-52. Instead, he retrieved his gun from a file cabinet. 2RP 722. Led by his attorney, the Defendant testified his guns were kept in locked containers. 2RP 722-23. Under cross-examination, he admitted this was false and that he knew very little about responsible gun ownership. 2RP 740-44. He claimed he had not been trying to shoot anyone, but only intended to “run them off” because they were scaring him. 2RP 684, 726. He claimed he intended to shoot high, but a shooting pain forced him to pull the trigger before he took aim. 2RP 725-26. He then immediately contradicted himself, volunteering that he fired several rounds “[b]ecause Vernon went one way, Steve went the other.” 2RP 727.

Even after the men ran, the Defendant kept shooting because he said he was afraid “they were going to come back.” 2RP 758. Where previously he had told police he shot the next rounds at the ground, at trial he claimed those had also been “up in the air.” 2RP 518, 726, 758-59. With each shot, he had to pull the hammer and aim. 2RP 759

When the Defendant returned to his house, he removed the spent casings from the revolver, leaving one live round inside. 2RP 728. There was ammunition on the kitchen counter as if the Defendant had either

loaded his gun before he shot at his neighborhood or as if he were reloading. 2RP 724. The Defendant claimed he retrieved the extra ammunition and second gun from a different location in order to be helpful to the police he had just flipped off. 2RP 108, 724-25.

By the Defendant's own admission, he had quite a bit to drink that day. 2RP 709-12, 729, 744-45.

Jury Instructions:

The defense proposed instructing the jury on the offense of Unlawful Display of a Weapon. CP 23-26; 2RP 773. Counsel Talney acknowledged that, under the law, a person could not commit the offense in his own abode, but argued the front porch was not part of the abode. 2RP 773-74. The Honorable Judge Jerry Costello denied the request, holding that the porch was part of the abode under *State v. Haley*, 35 Wn. App. 96, 665 P.2d 1375 (1983). 2RP 775-76.

The defense requested the court include language of "actual danger of injury" in Instruction 26. 2RP 774, 777-78. The judge appears to have made those modifications. 2RP 784. And the Defendant did not object to the modified instructions. 2RP 785. It reads:

A person is entitled to act on appearances in defending himself, if that person believes in good faith and on reasonable grounds that he is in actual danger of great personal injury, although it afterwards might develop that the person was mistaken as to the extent of the danger.

Actual danger is not necessary.

CP 55.

In closing, the defense argued that Mr. Aitchison had inflicted great personal injury on the Defendant when they grappled on the porch and Mr. Aitchison fell on him. 2RP 814. He argued the Defendant believed Mr. Aitchison would return to do so again, and the standard was a subjective one. 2RP 814, 819 (“conditions as they appeared to the person”). If the Defendant’s actions were reasonable and necessary, then the State could not prove lack of self defense beyond a reasonable doubt. 2RP 819. Ultimately, the jury was not satisfied the Defendant’s actions were reasonable and necessary. CP 68-69.

Defense argued that the mere discharge of a firearm would not necessarily result in any injury and did not establish a first degree offense. 2RP 804, 806-08. At the end of the day, the only person injured was the Defendant, and counsel argued that this proved he did not intend to injure others. 2RP 804-06, 808, 810, 814. Counsel argued the Defendant did not aim at Mr. Brown, who was running about and unable to see. 2RP 811-12, 824. The jury was persuaded that the State had not disproven these points beyond a reasonable doubt, convicting the Defendant of the second degree assaults of Mr. Aitchison and Mr. Frye and acquitting the Defendant of any charges against Mr. Brown. CP 65-73, 78.

He appeals from those convictions. CP 90.

V. ARGUMENT

A. **The Defendant had no right to any self-defense instruction where his assault on his neighbors was unjustifiable as a matter of law.**

Under RAP 2.4(a)(2), the appellate court will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review if demanded by the necessities of the case. In the instant case, the Defendant complains about self-defense instructions. Appellant's Opening Brief (AOB) at 12-16. Because his actions were unjustifiable as a matter of law, the State requests the Court find the Defendant he had no right to any self-defense instruction.

It may be lawful to use force if the actor is "about to be injured" and if used "in preventing or attempting to prevent an offense against his or her person" and if the force "is not more than necessary." RCW 9A.16.020(3). Persons may use that degree of force necessary to protect themselves as a reasonably prudent person would use under the conditions appearing to them at the time. *State v. Walden*, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997); *State v. Hill*, 76 Wn.2d 557, 566, 458 P.2d 171, 176 (1969); *State v. Bailey*, 22 Wn. App. 646, 650, 591 P.2d 1212, 1214 (1979). It may be lawful to use *deadly* force if the actor has "reasonable ground" to believe

they are in “imminent danger” of “some great personal injury” or felony and acts with the intent of preventing this injury. RCW 9A.16.050(1).

Mr. Aitchison had left the Defendant’s property as he requested. He was standing beside his truck with Mr. Frye on a public road. Mr. Aitchison had repeatedly said he would call the police and was in the process of doing just that. The Defendant was safely in his home.

A reasonably prudent person would not perceive it necessary for one’s protection to shoot at persons on a public road from the safety of one’s home as those persons were in the apparent act of departing. There was no reasonable ground to believe the Defendant was in imminent threat of any injury. The Defendant could have locked his door and called the police.

He testified he acted out of anger. By his own statement, the Defendant was trying to run the two men off, and he aimed in their direction. 2RP 107, 759, 768. The evidence was that that the Defendant shot *at* specific persons with a large caliber weapon used to kill bears. The first bullet did not go over their heads, but between Mr. Aitchison’s legs and hit his truck. The Defendant claimed he had not used the weapon in 30 years and found he was in too much pain to control his aim or even his trigger finger. 2RP 755, 759. Nevertheless, he continued shooting in their direction. This, as a matter of law, was an unjustifiable use of deadly force.

In *State v. Brigham*, 52 Wn. App. 208, 209, 758 P.2d 559, 560 (1988), the defendant was engaged in a physical fight with another man that escalated until he stabbed Bluford to death. The court held that if Brigham had merely displayed the knife during the fight, that “may well have been a reasonable response to Bluford’s attack.” *Brigham*, 52 Wn. App. at 210. But when he “thrust his knife into Bluford’s back eight times; this was excessive force as a matter of law under the circumstances, and could not be successfully interjected as self defense to Bluford’s attack.” *Id.*

In *State v. Griffith*, 91 Wn.2d 572, 573-76, 589 P.2d 799 (1979), Stillwell and York visited the defendant’s home to ask him to return a basketball which he had confiscated from neighbor children. He refused. *Id.* When one of the men stepped on the doorsill with one foot, the defendant shot and killed him. *Griffith*, 91 Wn.2d at 575-76.

It is uncontroverted that Mr. Stillwell and Mr. York were unarmed, had not engaged in any aggressive behavior, and that the first assault occurred when the defendant displayed his loaded gun and pointed it at Mr. York. Even if it is conceded that Mr. York moved forward toward the defendant, the use of deadly force was unjustified as a matter of law.

Griffith, 91 Wn.2d at 576.

Where a defendant does not act against an imminent threat or where his response is unquestionably excessive, it is unjustifiable as a matter of law. There is no right to jury instructions on self-defense.

B. The use of deadly force is only justified to prevent proportionate harm, i.e. great personal injury.

The Defendant challenges the self-defense instructions 23 and 26 which reference “great personal injury.” CP 52, 55. He argues that he was entitled to shoot at Mr. Aitchison and Mr. Frye if he feared any injury, no matter how small. Appellant’s Opening Brief (AOB) at 14. This is not the law. The use of *deadly* force is excessive or disproportionate if it is used against the threat of a perceived minor assault. *State v. Griffith*, 91 Wn.2d 572, 577, 589 P.2d 799 (1979) (simple assault or ordinary battery does not justify taking a human life).

Deadly force may only be used in self-defense if the defendant reasonably believes he or she is threatened with death or “great personal injury.”

Walden, 131 Wn.2d at 474 (citing 13A Royce A. Ferguson, Jr. & Seth Aaron Fine, Washington Practice, *Criminal Law* § 2604, at 351 (1990); RCW 9A.16.050(1), and 1 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive, Law* § 5.7(b) (1986)).

The Defendant claims his case is comparable to *State v. Woods*, 138 Wn. App. 191, 156 P.3d 309 (2007). AOB at 14. It is not. *Woods* did not involve the use of deadly force.

Woods was charged and convicted of third degree assault where he stabbed Probert in the shoulder, requiring three stitches. *Woods*, 138 Wn. App. at 194-96. A witness testified that Woods brought his hand down in a

stabbing motion, Probert yelled and then chased Woods with a hammer. *Id.* at 195-96. The court found that the facts of the particular case did not establish the use of deadly force. *Id.* at 201.

The term “great bodily harm” places too high of a standard for one who tries to defend himself against a danger less than great bodily harm but that still threatens injury. *Where the defendant raises a defense of self-defense for use of nondeadly force, WPIC 17.04 is not an accurate statement of the law* because it impermissibly restricts the jury from considering whether the defendant reasonably believed the battery at issue would result in mere injury.

Id. (quoting *State v. L.B.*, 132 Wn.App. 948, 953, 135 P.3d 508 (2006) and italicizing for emphasis).

In our own case, the Defendant alleged that he was defending himself against great bodily harm. 2RP 814-15. He “responded” with deadly force. Under these facts, the appropriate statutory definition was used.

The Defendant argues that the “deadly force” standard should only be used if the victim actually dies. AOB at 15. This is inconsistent with *Walden*. There the defendant was accused of “attempt[ing] to use” a knife in an altercation with teenagers. *Walden*, 131 Wn.2d at 472. He testified he only “produced” the knife to scare them off. *Id.* The jury convicted Walden of second degree assault. *Walden*, 131 Wn.2d at 471. The Washington Supreme Court reviewed the deadly force instructions and only

modified the definition of “great bodily injury” to that which was used in this case. *Id.* at 473-78; CP 56.

The Defendant’s proposal is also contrary to public policy. We do not condone the use of deadly force against minor offenses simply because the victim survives.

C. The trial court did not err in refusing to instruct the jury on Unlawful Display of a Firearm where it was not a lesser included of Assault and where it was not possible under the law for the Defendant to have committed the crime from his abode.

The Defendant challenges the trial court’s refusal to instruct the jury on the offense of Unlawful Display of a Firearm. AOB at 17. The Defendant requests *de novo* review on a matter of statutory interpretation. AOB at 24-25. Because the lower court arrived at a conclusion under *Workman* without actually describing the analysis, the State agrees that *de novo* consideration is proper.

1. The Defendant is not entitled to an instruction on Unlawful Display of a Firearm where the display/intimidation elements are not necessary to a conviction of First Degree Assault and where the evidence does not support an inference that *only* an Unlawful Display occurred.

Under RCW 10.61.006, a criminal defendant may be found guilty of an offense necessarily included within the offense charged in the information. This statute, in some form, dates back to 1854. *State v. Berlin*, 133 Wn.2d 541, 545, 947 P.2d 700, 701 (1997). The failure to instruct on

a lesser included offense is prejudicial error if the evidence supports an inference that the lesser offense was committed. *State v. Parker*, 102 Wn.2d 161, 164, 683 P.2d 189, 191 (1984).

The trial court commented in passing that Unlawful Display of a Firearm was a lesser included offense of Assault in the First Degree. 2RP 775. It provided no analysis in support of this cursory conclusion, which is in conflict with well-established law. Over a century ago, the Washington Supreme Court held “the crime of exhibiting a dangerous weapon in a rude, angry, and threatening manner is not necessarily involved in the crime of an assault with intent to commit murder.” *State v. Campbell*, 40 Wash. 480, 483, 82 P. 752, 753 (1905). The lower court’s opinion does not bind this Court. A reviewing court may affirm for any reason supported by the record and the law. *State v. Mitchell*, 190 Wn. App. 919, 924, 361 P.3d 205, 207 (2015).

a. The legal prong is not met.

The two-part *Workman* test determines whether a crime is a lesser included offense of the charged offense. “Under the first prong of the test (the legal prong), the court asks whether the lesser included offense consists solely of elements that are necessary to conviction of the greater, charged offense.” *State v. Condon*, 182 Wn.2d 307, 316, 343 P.3d 357, 361 (2015). If it is possible to commit the greater offense without having committed the

lesser offense, then the latter is not an included crime. *State v. Berlin*, 133 Wn.2d 541, 546 n.1, 947 P.2d 700(1997).

The Defendant's claim fails the legal prong. It is possible to commit an assault in the first degree, as charged, without committing a unlawful display of a firearm.

A first degree assault may be committed in a number of ways. RCW 9A.36.011. The State's actual charge, however, is limited to the definition under RCW 9A.36.011(1)(a). CP 1-2. Under the charged subsection, a person is guilty of assault in the first degree, if he or she, with intent to inflict great bodily harm, assaults another with a firearm.³

Unlawful Display, for our purposes, is defined as the carrying, exhibiting, displaying, or drawing of a firearm "in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons." RCW 9A.36.011(1). A display or intimidation is the crux of this offense.

A person can commit an assault under the charged prong without any witness ever seeing the firearm. The assault may be accomplished by actually shooting the victim. Or it may be accomplished by shooting *at* the

³ The charging information includes this language: "or any deadly weapon or by any force or means likely to produce great bodily harm or death." CP 1-2. However, because the firearm enhancement is alleged, it is reasonable to interpret that the charge is an assault with a firearm, and not any other weapon.

victim from a hidden location or simply when no one is looking. Accordingly, the essential elements of Unlawful Display (a display intended to menace or intimidate) are not necessary to a conviction of First Degree Assault. It is not a lesser included offense.

b. The factual prong is not met.

“Under the second (factual) prong, the court asks whether the evidence presented in the case supports an inference that *only* the lesser offense was committed, to the exclusion of the greater, charged offense.” *Condon*, 182 Wn.2d at 316. “The evidence must ‘affirmatively establish’ the commission of the lesser offense; ‘it is not enough that the jury might disbelieve the evidence pointing to guilt.’” *State v. Chambers*, 197 Wn. App. 96, 120, 387 P.3d 1108, 1120 (2016) (quoting *State v. Fernandez–Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000)).

The Defendant’s testimony was that he actually, intentionally, and repeatedly discharged his weapon in the specific directions of Mr. Aitchison and Mr. Frye, intending to “run them off” and actually causing them to flee.

[I]t is well settled in this state that second degree assault is committed when, within shooting distance, one points a loaded gun at another. *See, e.g., State v. Alvis*, 70 Wash.2d 969, 425 P.2d 924 (1967); *State v. Johnson*, 29 Wash.App. 807, 816, 631 P.2d 413, *review denied*, 96 Wash.2d 1009 (1981); *Murphy, supra*.

State v. Karp, 69 Wn.App. 369, 3704, 848 P.2d 1304, 1307, *review denied* 122 Wn.2d 1005, 859 P.2d 602 (1993).

To convict a defendant of second degree assault, the jury must find specific intent to create reasonable fear and apprehension of bodily injury. *State v. Byrd*, 125 Wash.2d 707, 713, 887 P.2d 396 (1995). Such intent may be inferred from pointing a gun, but not from mere display of a gun. *State v. Eastmond*, 129 Wash.2d 497, 500, 919 P.2d 577 (1996).

State v. Ward, 125 Wn. App. 243, 248, 104 P.3d 670, 672 (2004), *abrogated on other grounds by State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260 (2011). In other words, the Defendant's testimony established a second degree assault.

To be an assault, the act must be directed at some person and the actor must have the apparent physical ability to inflict harm. *Id.* See also CP 39. An unlawful display is distinguished from an assault in that it need not be "directed at any person. It is enough that a weapon is displayed under circumstances, and at a time and place that warrants alarm for the safety of other persons." *Karp*, 69 Wn. App. at 374.

The Defendant's evidence did not affirmatively establish that his weapons discharge was not directed at the specified victims. Therefore, there is no inference that only a display occurred to the exclusion of an assault. Unlawful Display of a Firearm is not a lesser included offense under the facts of this case.

In *State v. Karp*, the defendant was charged with second degree assault and requested an instruction on unlawful display. *Karp*, 69 Wn.

App. at 375. However, the defendant had testified at his trial that he pointed a shotgun at the nude man in his estranged wife's bed. *Id.* at 370, 376.

That evidence supports an inference that an assault was committed because it is intentional conduct that would place a reasonable person in apprehension of harm. *See Johnson, supra*. While Karp's conduct also supports an inference that he violated the unlawful display statute, the evidence does not support an inference that *only* that statute was violated. Karp was not entitled to the lesser included offense instruction.

Id.

Similarly in *State v. Prado*, 144 Wn. App. 227, 235, 241-44, 181 P.3d 901, 909 (2008), the trial court's refusal to instruct the jury on unlawful display was upheld after the defendant had testified that he had approached the victim with a knife in order to intimidate him.

This evidence supports an inference that an assault was committed because Mr. Prado engaged in an intentional act to place Mr. Guyer in apprehension of harm. While Mr. Prado's conduct also supports an inference that he violated the unlawful display statute, the evidence does not support an inference that *only* that statute was violated. Mr. Prado thus was not entitled to the lesser included offense instruction.

Prado, 144 Wn. App. at 244.

In another case, the defendant lacked the specific intent for assault due to a substance-induced psychosis with paranoid delusions. *State v. Baggett*, 103 Wn. App. 564, 566-68, 13 P.3d 659, 662 (2000). There, the court found the instruction on an unlawful display was justified.

Baggett held his rifle with the barrel pointing out rather than at the ground or in the air. The manner in which he held the rifle warranted alarm for the safety of Officer Salinas. These facts, coupled with evidence of Mr. Baggett's diminished capacity to form the specific intent for second degree assault, support an inference that he committed only the offense of unlawful display of a firearm.

Baggett, 103 Wn. App. at 571.

Our own case is distinguished from *Baggett* in that the Defendant did not raise a diminished capacity defense. CP 100; 2RP 805. Certainly the Defendant Miller testified that he had been drinking. 2RP 709-12, 729-30, 744-45. But a diminished capacity would require expert testimony and evidence of a mental disorder. *State v. Atsbeha*, 142 Wn.2d 904, 914, 921, 16 P.3d 626 (2001); *State v. Ager*, 128 Wn.2d 85, 95, 904 P.2d 715 (1995) (the instruction should not be given if evidence on any element is lacking).

This Court should hold that the Defendant was not entitled to an instruction on Unlawful Display where the record does not support an inference that *only* this offense occurred, to the exclusion of an assault. It is not a lesser included offense.

Although Washington law already provides a statutory right to an instruction on a lesser included offense, the Defendant argues that this Court should find that there is a due process right as well. AOB at 29. Because Unlawful Display is not a lesser included offense on this record, the discussion is moot.

2. The trial court did not err in refusing to instruct the jury on a crime which the Defendant could not commit.

The trial court noted that, as a matter of law, a person does not commit Unlawful Display if the act occurs in one's abode.

(1) It shall be unlawful for any person to carry, exhibit, display, or draw any firearm [...] in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons.

....

(3) Subsection (1) of this section shall not apply to or affect the following:

(a) Any act committed by a person while in his or her place of abode or fixed place of business;

RCW 9.41.270.

In coming to this conclusion, the court reasonably relied upon *State v. Haley*, 35 Wn. App. 96, 665 P.2d 1375 (1983) (Division III). In that case, the juvenile had been standing on a deck attached to his home, surrounded by a railing about 3 feet high on two sides and accessible from the living and dining room areas, an overhead balcony attached to the home, as well as the back yard. *Haley*, 35 Wn. App. at 97. From this spot, he observed two children trying to retrieve a pet dog who had wandered up a steep embankment. *Id.* Haley pointed his BB gun at the tram tracks where one of the children was standing and advised that she was trespassing on private property. *Id.* at 97-98. In running, the child fell and was severely injured. *Id.* The court of appeals held that the defendant was in his "place of abode"

while standing on the deck at the rear of family residence. The analysis turned on a dictionary definition of “abode” and the general principle which construes statutes in favor of defendants. In this statute, the principle requires that “while in his or her place of abode or fixed place of business” be interpreted broadly so as to criminalize less behavior.

The Defendant Mitchell’s front porch is even more a part of his home than Haley’s broad deck with swimming pool. It is a few square feet; a short landing to search for one’s keys between climbing the steps and entering the trailer. Exh. 11, 17; 2RP 392 (two and a half feet off the ground), 423 (five or six feet long, barely enough room for two people).

The Defendant urges that his porch is less like a deck and more like the backyard in *State v. Smith*, 118 Wn. App. 480, 484, 93 P.3d 877, 879 (2003) (Division I). “[O]n the outskirts of his backyard where only a fence with breaks in it separated him from the tow operators,” Smith menaced employees trying to tow a vehicle from the church parking lot. *Smith*, 118 Wn. App. at 482, 485 n. 8. He displayed a .45 caliber pistol, brandished a four-foot metal pipe, and threw a hammer, lodging it in a tree. *Id.* The court reasoned the yard, while part of the curtilage which enjoys heightened protection under the Fourth Amendment, is also an area exposed or impliedly open to the public. *Smith*, 118 Wn. App. at 484. The court also

observed that the language of “in” one’s abode suggested a structure, not a yard. *Id.*

But a yard is not a structure or enclosure like a deck or porch surrounded by a gate or fence which a person can be “in.” The facts of this case are not controlled by *Smith*.

More recently, in *State v. Owens*, 180 Wn. App. 846, 849, 324 P.3d 757, 761 (2014) (Division II), sheriff’s deputies responded to a domestic violence call, aware that the defendant had said, “You call the cops? Are they coming here? Well, good. I’ll get the gun.” Deputies came to a locked gate and were forced to park a quarter mile away and approach on foot where they saw the defendant walk from the back door to the detached garage carrying a rifle. *Owens*, 180 Wn. App. at 849. He ignored their demand that he drop the gun, and instead ducked down behind a car. *Id.* The court of appeals did not find any conflict between *Smith* and *Haley*. It held that Owens was not in his abode as he was neither inside his residence nor on a structure attached to his residence when he unlawfully displayed his rifle to police. *Owens*, 180 Wn. App. at 855.

The trial court’s decision is consistent with *Haley* and *Owens* and is not in conflict with *Smith*. There is no error. The court could not instruct the jury on Unlawful Display. As a matter of law, the crime could not be

committed from the porch, which is a structure attached to the residence and properly construed as being part of the Defendant's abode.

D. The trial court did not abuse its discretion in refusing to appoint new counsel where the Defendant did not allege any actual conflict of interest.

The Defendant claims that the trial court violated his right to effective assistance of counsel by failing to sufficiently inquire into the alleged conflict by asking specific and targeted questions. AOB at 38-39. He does not suggestion what questions should have been asked and fails to provide the relevant standards.

A trial court's refusal to appoint new counsel is reviewed for an abuse of discretion. *State v. Cross*, 156 Wn.2d 580, 607, 132 P.3d 80 (2006); *State v. Lindsey*, 177 Wn. App. 233, 248, 311 P.3d 61 (2013). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Lindsey*, 177 Wn. App. at 249. The reviewing court considers the extent of the conflict between client and counsel, the timeliness of the motion, and the adequacy of the lower court's inquiry. *Id.*

In *Lindsey*, the defendant's allegations of friction (mislabeled by the defendant as a conflict of interest) were not serious. *Lindsey*, 177 Wn. App. at 249. The motions "seemed to change as the time for trial neared, suggesting that they were fleeting requests not based on a tangible conflict."

Id. at 249-50. And the trial court permitted the defendant to air his grievances in three hearings and defense counsel to respond on one occasion. *Id.* The denial of the motion for new counsel was not an abuse of discretion. *Id.* at 250.

Where the defendant claims ineffective assistance due to a conflict of interest, prejudice will be presumed *only if the defendant proves an actual conflict*. A conflict of interest is not a per se violation of the constitutional right. *In re Gomez*, 180 Wn.2d 337, 348, 325 P.3d 142, 148 (2014)(citing *Holloway v. Arkansas*, 435 U.S. 475, 482, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978)). A defendant alleging ineffective assistance due to a conflict of interest must show:

that (a) defense counsel “actively represented conflicting interests” and (b) the “actual conflict of interest adversely affected” his performance. *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). Possible or theoretical conflicts of interest are “insufficient to impugn a criminal conviction.” *Id.* If the defendant makes both showings as to the alleged conflict of interest, then the court presumes prejudice and the defendant proves her claim. *Id.* at 349–50, 100 S.Ct. 1708.

Gomez, 180 Wn.2d at 348–49.

In our own case, the court permitted the Defendant to air his complaint in two separate hearings. The court also requested counsel respond on each occasion. That adequate inquiry was sufficient to ascertain that the Defendant was *not* alleging an actual conflict of interest or

breakdown in communication, but only a desire to have his attorney share his opinions. The Defendant complained that his attorneys did not prioritize his case above all others and did not enthusiastically recommend that he would be acquitted at trial. This is not a conflict. *State v. Cross*, 156 Wn.2d 580, 607, 132 P.3d 80, 92 (2006), *abrogated on other grounds by State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018) (conflict over strategy is not the same thing as a conflict of interest).

This is not the type of conflict with counsel that raises Sixth Amendment concerns. *Cf. Mickens v. Taylor*, 535 U.S. 162, 172 n. 5, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002) (actual conflict of interest could include attorney representation of a witness); *Frazer v. United States*, 18 F.3d 778, 785 (9th Cir.1994) (conflict existed when attorney verbally assaulted client with racially derogatory term); *Brown v. Craven*, 424 F.2d 1166, 1169–70 (9th Cir.1970) (perfunctory work can rise to cognizable conflict); *accord Restraint of Stenson*, 142 Wash.2d at 729, 16 P.3d 1 (fact that attorney and client disagreed over trial strategy not sufficient to find a cognizable conflict even after counsel testified that he “can’t stand the sight of” his client). Instead, this is the type of conflict that courts generally leave to the attorney and client to work out, absent actual ineffective assistance of counsel. *Cf. Kaczynski*, 239 F.3d at 1118 (refusing to find plea involuntary even if it were motivated by defendant’s desire not to have mental health evidence submitted to the jury).

Cross, 156 Wn.2d at 609.

If convicted as charged, the Defendant faced a sentence of 38-45 years.⁴ Based on the evidence, the Defendant was likely to be convicted of something. And, if so, the firearm enhancements would necessarily be imposed and would be a significant part of the sentence. That is, in fact, what happened. His seven-year sentence results from a 12-month base sentence and 72 months in firearm enhancements. CP 79, 82. In consideration of the Defendant's age, health, and lack of criminal history, this is a significant sentence. He was 64 at the time of the offense, an alcoholic with residual weakness and numbness after a back injury. CP 1; 2RP 676-78. Under these circumstances, an attorney who did not recommend the client seriously consider a plea negotiation would be performing deficiently. *Lafler v. Cooper*, 566 U.S. 156, 168, 132 S. Ct. 1376, 1387, 182 L. Ed. 2d 398 (2012) ("If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it").

In a recent unpublished case, the court made a similar inquiry in which it reviewed written motions and provided the defendant a full opportunity to air his concerns in two separate hearings. *State v. Luyster*,

⁴ The Defendant was charged with three "serious violent" offenses. RCW 9.94A.030(47)(a)(v). The base sentence for a single count would have been 93-123 months. RCW 9.94A.510; RCW 9.94A.515 (seriousness level of XII). Each sentence would have run consecutively. RCW 9.94A.589(1)(b). The consecutive enhancements would be five years per count. RCW 9.94A.533(3)(a).

11 Wn. App. 2d 1048, 2019 WL 6877901, at *3, *5 (2019), *review denied*, 461 P.3d 1195 (Wash. 2020) (cited as persuasive authority only under GR 14.1). This was held to be an adequate inquiry and not an abuse of discretion. *Id.* The court of appeals held no authority required the lower court to make a specific inquiry, and the defendant failed to show how the alleged conflict would have affected representation. *Id.*

From the Defendant's recitation of standards, there is a suggestion that perhaps the Defendant is alleging a complete collapse of the attorney-client relationship due to distrust. AOB at 37-38. If so, such a claim would be contrary to the record. The attorneys and their investigator were meeting with the Defendant and showing him all the discovery they had received. They gave him their best advice. When the Defendant rejected the State's plea offer, his attorneys provided a vigorous defense at trial. They challenged the victims' motives and ability to observe, inserted evidence of intoxication in order to imply accident or lack of intent, and argued self-defense. They challenged jury instructions and requested a misdemeanor lesser included offense. The Defendant's testimony demonstrated preparation, i.e. a working collaboration. The attorneys' vigorous defense resulted in an acquittal on one count and lesser offenses on the other two counts. The record demonstrates excellent communication. The Defendant received effective assistance of counsel.

The court did not abuse its discretion in denying a request for change of counsel on this record.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's convictions.

RESPECTFULLY SUBMITTED this 22nd day of May, 2020.

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05/22/20 s/Aeriele Johnson
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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